FILE COPY

Office-Supreme Court, U.S.
FILED
OCT 15 1958
JAMES R. BROWNING, Clerk

No. 383

In the Supreme Court of the United States

OCTOBER TERM, 1958

HOWARD R. MARSHALL, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

J. LEE RANKIN,
Solicitor General,
MALCOLM ANDERSON,
Assistant Attorney General,
BEATRICE ROSENBERG,
Attorney,
Department of Justice,
Washington 25, D. C.

INDEX

	Page
Opinion below	1
Jurisdiction	1
Questions presented	1
Statement	2
Argument	4
Conclusion	5

CITATIONS

Cases:

Masciale v. *United States*, 356 U.S. 386	4
Reining v. *United States*, 167 F. 2d 362, certiorari denied, 335 U.S. 830	4
Rowley v. *United States*, 185 F. 2d 523	5
United States v. *Pisano*, 193 F. 2d 355	4

Statutes:

21 U.S.C. 331 (k)	2
21 U.S.C. 353 (b) (1) (B)	2

In the Supreme Court of the United States

OCTOBER TERM, 1958

No. 383

HOWARD R. MARSHALL, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals (Pet. 6-19) is not yet reported.

JURISDICTION

The judgment of the Court of Appeals was entered on July 22, 1958. Rehearing was denied on August 21, 1958. The petition for a writ of certiorari was filed September 19, 1958. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the trial judge properly refused to hold that there was entrapment as a matter of law.

2. Whether the trial judge properly refused to grant a mistrial on the ground that during the trial some of the jurors had read newspaper stories unfavorable to the petitioner.

STATEMENT

An information filed in the District Court for Colorado alleged that on two occasions the petitioner unlawfully dispensed a number of dextro-amphetamine sulfate tablets, a drug within the scope of 21 U.S.C. 353 (b)(1)(B), without a prescription from a licensed physician, which resulted in misbranding in violation of 21 U.S.C. 331(k) (R. 2-4). At the trial, a government agent, Robert E. Keating, testified that he was introduced to the petitioner in the guise of a salesman (R. 8-10, 26-28). After some casual conversation, Keating told the petitioner that he was about to undertake a lengthy trip by car, and was desirous of obtaining some "stay-awake" pills (R. 10, 26-27). The petitioner suggested using No-Doz and coffee, but Keating replied that he had tried this to no avail (R. 10, 26, 27). Nothing further was said about the matter, but as Keating was leaving the petitioner's apartment he was called back and given a package by the petitioner which contained five tablets and two capsules. The petitioner gave Keating directions to take the tablets during the trip and the capsules later if he felt nervous (R. 10-11, 25). Later analysis showed that the tablets in the package were dextro-amphetamine sulfate tablets (R. 30-31). At a later time, Keating said he would like about a hundred of the drugs to leave in the car since he was going on another trip. Keating obtained 50 tablets of the drug and 24 capsules, this time paying the petitioner $15 (R. 15-16, 31-32, 33-35).

The petitioner asked the trial judge to hold that there was entrapment as a matter of law, but this request was refused (R. 85). The government asked to be allowed to prove that the petitioner had previously practiced medicine without a license, as tending to refute the defense of entrapment. This too was refused, the trial judge being of the opinion that since it would not be shown that the petitioner dispensed drugs of a type here involved, the evidence would not be relevant for the government's purposes (R. 85-87).

During the trial, news stories were published which contained statements about the petitioner's previous criminal record, the conviction already obtained against the petitioner's wife on charges growing out of the same affair, and testimony given by the petitioner before an Oklahoma legislative committee relating the ease with which the petitioner practiced medicine without a license and identifying the petitioner as the man who had prescribed drugs for Hank Williams, a singer, shortly before the latter's death. (R. 107, 108). At the trial itself, the petitioner did not take the stand. When it was learned that some of the jurors had apparently seen the articles, the judge called each of the jurors into his chambers individually (R. 54-60, 90-106). Counsel for both sides were present during the questioning, and participated in the inquiry. (R. 90-106). Six of the jurors had not read the articles and did not know the contents (R. 90-91, 93, 95-96, 97-98, 101-102, 103-104). Two of the remaining six said they had only scanned the articles and could not recall the contents (R. 93-94, 98-100). The other four had no hesitation in saying that they felt no prejudice against the petitioner, and that they could decide the case solely on the basis of the testi-

mony given in court (R. 91-92, 100-101, 102-103, 104-106). The petitioner's motion for mistrial was thereupon denied (R. 59-60).

The petitioner did not interpose any evidence of his own (R. 85). The judge submitted the case to the jury with an instruction on entrapment (R. 88-89). The petitioner was found guilty on both counts and sentenced to imprisonment for six months (R. 4, 6-7). The Court of Appeals for the Tenth Circuit affirmed, one judge dissenting (Pet. 6-19).

ARGUMENT

1. The Court of Appeals felt that the undisputed evidence so far failed to present any issue of entrapment that, in submitting the issue to the jury at all, the district court was more favorable to the petitioner than was required. Cf. *United States* v. *Pisano*, 193 F. 2d 355 at 361 (C.A. 7). Whether this is correct or not, the testimony was not such as to call for a directed verdict based on entrapment. *Masciale* v. *United States*, 356 U.S. 386. The petitioner was obviously not introduced by Keating to the business of selling pills without prescription. Keating provided the opportunity to make the sale, but, significantly, on the first occasion the petitioner had the drugs and capsules in his possession. He not only delivered them to Keating but he gave Keating directions for use. Later he sold Keating a substantial quantity, 50 tablets for $15.00, after telling him that he did not have enough tablets on hand and to come back later. On this evidence, the jury had the right to conclude that the petitioner was not entrapped.

2. A motion for a mistrial is directed to the discretion of the trial judge. *Reining* v. *United States*, 167 F. 2d 362 (C.A. 5), certiorari denied, 335 U.S. 830. The

fact that some of the jury read articles containing information about the petitioner's criminal record does not require a reversal, even though such information was inadmissible at the trial. *Rowley* v. *United States*, 185 F. 2d 523 (C.A. 8). Before allowing the trial to proceed, the trial judge assured himself of the ability of the jury to render an impartial verdict. He took careful precautions in this respect, questioning each juror individually and having counsel join in the proceedings. The case presented a simple factual issue, as one of the jurors indicated (R. 102). And while the information in the articles had a bearing on the issue of entrapment that claim was so unsubstantial that there is no reason to assume prejudice in the face of the contrary finding of the trial judge made after careful inquiry.

CONCLUSION

The case was correctly decided in the lower courts on both the law and the facts. There is no issue calling for review by this Court.

Respectfully submitted,

J. LEE RANKIN,
Solicitor General.

MALCOLM ANDERSON,
Assistant Attorney General.

BEATRICE ROSENBERG,
Attorney.

OCTOBER 1958.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1958 404994 3-2